

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID ROBNETT,)	
)	
Claimant,)	IC 1998-025222
v.)	
)	
KONKOLVILLE LUMBER)	FINDINGS OF FACT,
COMPANY, INC.,)	CONCLUSIONS OF LAW,
)	AND ORDER
Employer,)	
)	
and)	
)	filed January 25, 2008
WAUSAU UNDERWRITERS)	
INSURANCE COMPANY,)	
)	
Surety,)	
Defendants.)	
)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Lora Rainey Breen. A hearing was held on April 7, 2006 and a decision issued on August 7, 2006. The decision concluded that Defendants waived the statutory limitation period set forth in Idaho Code § 72-706, and Claimant's claim is not barred.

Thereafter, the case was re-assigned to the Commissioners. On August 24, 2007, Commissioners James F. Kile and R.D. Maynard conducted a hearing in Lewiston, Idaho, on the remaining issues. Claimant was present and represented by Danny Radakovich of Lewiston. Monte Whittier, of Boise, represented Defendants Employer and Surety. Oral and documentary evidence was presented. The parties took no post-hearing depositions. Claimant submitted no post-hearing briefs. Defendants filed a post-hearing brief. The matter is now ready for decision.

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ISSUES

The Notice of Hearing identified the following issues:

1. Whether Claimant's condition is due in whole or in part to a pre-existing injury/condition.
2. Whether and to what extent Claimant is entitled to the following benefits:
 - a. Medical care;
 - b. Temporary partial and/or temporary total disability benefits (TPD/TTD);
 - c. Permanent partial impairment (PPI);
 - d. Retraining; and
 - e. Disability in excess of impairment.
3. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.
4. Whether Claimant is entitled to attorney fees pursuant to Idaho Code § 72-804.

After discussion by the parties, the only issues remaining at the time of hearing were Claimant's entitlement to 1) medical care, 2) retraining, and 3) disability in excess of impairment.

CONTENTIONS OF THE PARTIES

Claimant injured his knee when he jumped off a stack of wood while working for Employer. Claimant contends that he continues to have problems with his knee and his doctor is unable to predict if he will need an artificial knee. Claimant argues that although he is earning a higher wage at his current job than his time of injury wage, his earning potential is essentially capped because he is in the highest position he will be able to achieve. Thus, Claimant avers he is entitled to disability beyond impairment.

Defendants contend that Claimant has not made a claim for additional medical care at this time. Defendants argue that Claimant is not entitled to retraining because Claimant has not

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presented testimony or evidence as to what programs, training, or services he desires or whether they are available to him. Finally, Defendants contend that Claimant is earning a higher wage at his current job and has presented no evidence that he is entitled to disability in excess of impairment.

EVIDENCE CONSIDERED

The record in the instant case consists of:

1. Testimony of Claimant at hearing on August 24, 2007;
2. Claimant's Exhibit 1 admitted at hearing on August 24, 2007;
3. Defendants' Exhibits A-M admitted at hearing on August 24, 2007; and
4. The Idaho Industrial Commission legal file.

After having considered all the above evidence and Defendants' brief, the Commission issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Accident and Medical Treatment

1. At the time of hearing Claimant was 35 years old. He sustained a knee injury on July 8, 1998, when he jumped down from a unit of lumber and landed wrong. Claimant felt immediate pain in his right knee. At the time of injury Claimant was earning \$8.50 per hour working for Employer as a dry chain puller.

2. Claimant saw Kelly McGrath, M.D., on July 10, 1998. Claimant complained of his knee giving way, popping, and continued swelling. Claimant's symptoms did not resolve and he was referred for an orthopedic evaluation. Surety accepted the claim.

3. Marvin Kym, M.D., evaluated Claimant on September 25, 1998. Dr. Kym diagnosed a possible ACL disruption and/or lateral meniscus tear of Claimant's right knee.

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4. On October 27, 1998, Ned Schroeder, M.D., performed an operative arthroscopy with chondroplasty of the medial femoral condyle and excision of medial synovial plica, on Claimant's right knee. Defendants' Exhibit G. Claimant then returned to the care of Dr. Kym.

5. Claimant was seen on January 2, 2000, after he slipped on some ice walking to a house on December 31 and reinjured his right knee. Surety continued to accept Claimant's claim.

6. On May 2, 2000, Dr. Kym noted that while Claimant has been working hard in physical therapy, he still has some atrophy in his quadriceps muscle. Dr. Kym performed an arthroscopic lateral retinacular release on Claimant's right knee on May 24, 2000.

7. Claimant continued to have pain and weakness in his right knee and quadriceps muscle. On March 7, 2001, Dr. Kym performed a trillat tibial osteotomy, medial retinacular reefing, and a redo of the lateral retinacular release. On July 19, 2001, Dr. Kym found Claimant to be well healed and working very hard in physical therapy.

8. On August 30, 2001, Dr. Kym found Claimant to be stable and assessed a 10% lower extremity (4% whole person) permanent partial impairment rating. Claimant's permanent restrictions included no crawling, no kneeling, very limited squatting, lifting at or less than 25 pounds, and very limited up and down steps and walking on uneven ground. Dr. Kym also stated that, considering his time of injury job, Claimant needs to be considered for retraining. Defendants' Exhibit F.

9. Claimant had a yearly check up with Dr. Kym on January 7, 2003. The notes state that Dr Kym does not think Claimant's situation has changed appreciably, but there is a possibility for a future surgery. Defendants' Exhibit F.

10. On August 6, 2007, 18 days before hearing, Claimant saw Dr. Kym. There are no

medical records in evidence for Claimant from February 2003 until the August 2007 visit. Dr. Kym's notes from the August 6, 2007 visit were admitted as Claimant's only exhibit. The notes state that Claimant is encouraged to do straight leg raise exercises, he can work as tolerated, he should follow up as needed, and no further surgery is planned. Claimant's Exhibit 1.

Vocational Information

11. Industrial Commission Rehabilitation Division (ICRD) consultant Cris Puckett assisted Claimant from September 2001 to May 2002. When contacted by Cris Puckett in May 2002, Dr. Kym listed Claimant's permanent restrictions as follows: may lift up to 50 pounds occasionally, may sit and/or stand frequently, may kneel and/or crouch occasionally, no twisting. Defendants' Exhibit C. There is no explanation for the changes from Dr. Kym's restrictions given one year before.

12. Claimant returned to work on March 4, 2002 when he obtained a position as a sanitation engineer for Simmons Sanitation Service in Kamiah, Idaho. Cris Puckett closed Claimant's case when he maintained his new job as a sanitation engineer for 30 days. The labor market information, compiled by Cris Puckett, listed several job titles possible for Claimant including hardware assembler, sign maker/machine operator, cabinet assembler, road roller operator/heavy equipment operator, bull chain operator. The local hourly wages for the job titles ranged from \$6.25 to \$18.00 per hour. Defendants' Exhibit C.

13. When Claimant began working for Simmons he was picking up trash cans and dumping them. He did that for approximately two years before he was promoted to garbage truck driver. Claimant's wage at the time of hearing was \$10.00 per hour, and he was working full time. Tr., p. 29. Claimant testified that his right knee causes him pain when he works. Tr., p. 28. Claimant stated that since beginning with Simmons Sanitation he has not looked for other

work.

14. Claimant graduated from high school, and has held jobs as a firefighter for the Department of Lands and a snow shoveler for a logging crew. Tr., p. 53.

Time of Injury Job and Training with Employer

15. Claimant worked for Employer for approximately five years before his July 8, 1998 industrial accident. At all times pertinent to this decision, Claimant has resided and worked in the Kamiah, Idaho area.

16. At the time of Claimant's industrial accident he had been training for a month as a forklift operator and bander operator. Tr., p. 30. Claimant testified that once better people could be found to work on the dry chain and one of the current forklift operators was assigned to a different job, Claimant would be promoted to forklift operator. Claimant testified that at the time of his accident, 1998, he thought he would be paid "probably at least eleven something" as a forklift operator. Tr., p. 32.

DISCUSSION AND FURTHER FINDINGS

Medical Benefits

17. An employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be required by the employee's physician or needed immediately after an injury or disability from an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432(1). It is for the physician, not the Commission, to decide whether the treatment was required. The only review the Commission is entitled to make of the

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physician's decision is whether the treatment was reasonable. *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

18. Defendants have consistently accepted the claim and acknowledge that they are liable for Claimant's treatment related to his July 8, 1998, industrial accident. But Defendants argue that they are not responsible to pay for the visit Claimant participated in just prior to hearing because the visit was strictly for hearing purposes.

19. Claimant had an appointment with Dr. Kym on August 6, 2007, 18 days before hearing. Dr. Kym's notes from that visit were admitted as Claimant's only exhibit. The notes state that Claimant is encouraged to do straight leg raise exercises, he can work as tolerated, he should follow up as needed, and no further surgery is planned. Claimant's Exhibit 1.

20. The only unpaid medical benefit in dispute is the August 6, 2007, visit to Dr. Kym. There is no indication that Claimant returned to Dr. Kym for any treatment. The fact that Claimant sought no treatment for 4 years before the 2007 visit and the fact that the notes from that visit are Claimant's only exhibit, lead to the conclusion that the appointment was made only for purposes of gaining an additional medical record to submit as evidence at hearing. Claimant presented no medical need for the appointment. The Commission finds that Claimant's visit to Dr. Kym on August 6, 2007, was not for treatment related to his industrial accident.

21. Based on the findings above, the Commission finds Claimant entitled to reasonable medical treatment related to his July 8, 1998 industrial accident. Defendants are not responsible to pay for Claimant's visit to Dr. Kym on August 6, 2007.

Retraining

22. Idaho Code § 72-450 allows for retraining benefits under certain circumstances. Here, Claimant has presented no retraining plan nor any evidence that Claimant requested

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retraining. Further, because Claimant submitted no post-hearing briefs, Claimant's only mention of retraining is a statement at the beginning of the hearing when the parties decided which issues were withdrawn. Tr., p. 6. The Commission finds Claimant has not proven his entitlement to retraining benefits.

Disability in excess of impairment

23. The burden of proof is on claimant to prove the existence of any disability in excess of impairment. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1986). "Evaluation (rating) of permanent disability" is an appraisal of the Claimant's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided for in Idaho Code § 72-430. Idaho Code § 72-425. Among the pertinent nonmedical factors are the claimant's age, his occupation, education, personal and economic circumstances, or other factors that diminish the claimant's ability to compete in an open labor market within a reasonable geographical area. Idaho Code § 72-430.

24. Claimant is a 35 year old high school graduate residing in Kamiah, Idaho. Prior to his injury, Claimant was earning \$8.50 per hour working as a dry chain puller. As a result of his industrial injury and subsequent right knee surgeries which left him with an impairment and permanent restrictions, Claimant was not able to return his time of injury job or any job with Employer.

25. The most recent restrictions given by Dr. Kym allow Claimant to lift up to 50 pounds occasionally, sit and/or stand frequently, kneel and/or crouch occasionally, but restrict Claimant from twisting. Dr. Kym rated Claimant's permanent partial impairment at 10% of the lower extremity (4% of the whole person).

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26. The record in this matter does not include any expert testimony from vocational experts regarding the percentage of labor market loss that Claimant might have incurred as a result of his occupational injury. The ICRD consultant found, based on Claimant's education, Claimant's customary labor market, age, transferability of skills, restrictions, and the physician's recommendations, that Claimant has multiple jobs available to him in the Kamiah area. The specific job titles include hardware assembler, sign maker/machine operator, cabinet assembler, road roller operator/heavy equipment operator, bull chain operator. The local hourly wages for the job titles range from \$6.25 to \$18.00 per hour.

27. Claimant's supposed argument that if he had been able to stay with Employer he would have moved into a position as a fork lift operator is speculative. Claimant had not completed his training as a fork lift operator, there were no positions available, and there is no concrete evidence of what the position paid. Claimant is currently employed as a sanitation engineer earning \$10.00 per hour, well above his time of injury wage. The ICRD consultant found several job titles in Kamiah with pay ranges that are comparable to Claimant's time of injury wage.

28. The only evidence in the record shows that there are positions available to Claimant within his restrictions and in his geographical area. Additionally, Claimant has re-established and even improved his pre-injury wage. Claimant has not proven entitlement to permanent partial disability in excess of impairment.

CONCLUSIONS OF LAW AND ORDER

1. Claimant is entitled to medical care for his right knee related to his July 8, 1998, industrial accident. Defendants are not responsible to pay for Claimant's visit to Dr. Kym on August 6, 2007.

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2. Claimant has failed to prove that he is entitled to retraining benefits.
3. Claimant has failed to prove that he is entitled to disability in excess of impairment.
4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this __25th day of January, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

_____/s/_____
R.D. Maynard, Commissioner

_____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _25th day of January, 2008, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

DANNY J RADA KOVICH
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sb

____/s/_____